

SERVER LOCATION NOT DEFINITIVE IN DETERMINING JURISDICTION OVER FOREIGN DEFENDANT

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Canadian courts will generally assume jurisdiction over proceedings that have a real and substantial connection to them. This broad test for taking jurisdiction understandably sets off alarms for businesses that transact business over the Internet and across borders. For many of these businesses, there is a concern that they may be subject to lawsuits in any country which their customers use their service from.

In deciding whether or not it has jurisdiction over extra-territorial defendants, a Canadian court will consider whether a sufficient connection exists between the wrongful conduct and the jurisdiction.^[1] Companies seeking to avoid subjecting themselves to Canadian jurisdiction should note that the analysis is not limited to the defendant's physical presence in the jurisdiction, but also must consider the connection between the alleged wrongful conduct and the jurisdiction. With respect to online conduct, Canadian courts have found that relevant connecting factors include: (1) the location of the target audience of the website; (2) the source of the content on the website; (3) the location of the website operator; and (4) the location of the host server.^[2]

The Federal Court recently applied these factors to find that a Romanian website hosted entirely outside of Canada was subject to Canadian privacy legislation.^[3] In that case, the Romanian website reproduced content from CanLII.org, Canada's free online legal database of court and tribunal decisions. In order to protect the personal information of litigants, CanLII took steps to ensure that cases published on its website are not searchable through search engines like Google. In contrast, the Romanian website did not take any steps to prevent personal information from being searchable and instead required Canadians to pay a fee for the immediate removal of their personal information from the website.

The Court found that even though the website operator and host server are located in Romania, when an organization's activities take place exclusively through a website, the physical location of the website operator or host server is not determinative of jurisdiction. A sufficient connection was found between the Romanian website's conduct and Canada. This was based on the grounds that the website's content was comprised of Canadian court decisions copied from a Canadian website, the website directly targets Canadians through advertisements, and that the impact of the website is felt by Canadians.^[4]

By contrast, the Federal Court has declined jurisdiction over a dispute where the defendant did not have a physical presence in Canada (i.e. no office locations or web servers) and did not specifically advertise, market or solicit business from the Canadian market.^[5] In that case the defendant in a proposed class action was alleged to have violated Canada's Competition Act by bundling spyware with its free software without disclosing the bundling to consumers of the software.

In refusing jurisdiction, the Court noted that, in addition to the lack of any physical presence in Canada, the defendant had not availed itself of Canadian laws. In addition the company did not specifically seek to do business with Canadians, and did not have any Canadian bank accounts or pay Canadian taxes. The only connection to Canada was that individuals in Canada had downloaded the free software. The Court found that it would be manifestly unfair to subject the defendant to the jurisdiction of a Canadian court as it would mean that a company with no business assets or physical presence in a jurisdiction could be sued in any country to which its products are downloaded.^[6]

Companies seeking to insulate themselves from Canadian law by purposefully refraining from establishing meaningful connections within the jurisdiction (for instance, by strategically locating their servers elsewhere) should consider whether they may still inadvertently establish connections with Canada. Connections may be formed, for instance, by physical presence in Canada or by business practices that target Canadians. Defendants seeking to be insulated from the jurisdiction of Canadian courts will have to demonstrate that any asserted connection to Canada is sufficiently remote that a real and substantial connection to the jurisdiction does not exist.

by Mitch Kocerginski and George Waggott

[1] *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17.

[2] *A.T. v. Globe24h.com*, 2017 FC 114 at para 53.

[3] *A.T. v. Globe24h.com*, 2017 FC 114.

[4] *A.T. v. Globe24h.com*, 2017 FC 114 at para 55.

[5] *Desjean v. Intermix Media Inc.*, 2007 FC 1395 (aff'd by *Desjean v. Intermix Media Inc.*, 2007 FCA 365 (F.C.A.)).

[6] *Desjean v. Intermix Media Inc.*, 2007 FC 1395 at para 35.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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